

**MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

JAMIE N. ESTES,)
)
Appellant/Plaintiff)
)
vs.) **Appeal No. ED82102**
)
NORWEST MORTGAGE, INC. et al,)
)
)
Respondent/Defendant)

—

**Appeal From The Circuit Court of The City of St. Louis
Hon. Margaret M. Neill
Circuit Judge**

—

BRIEF OF APPELLANT

—

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II. **Statement of Jurisdiction**

This is a civil appeal by Plaintiff/Appellant JAMIE N. ESTES ("Estes") from a November 1, 2002 order (LF:71) by The Circuit Court of The City of St. Louis, Missouri (Hon. Margaret M. Neill, Circuit Judge) setting aside (and imposing sanctions) an August 2, 2002 \$200,000.00 Final Judgment (LF:52) in favor of Estes and against Respondent GARNER REAL ESTATE MARKETING SPECIALIST, INC. ("Garner").

The Petition originally involved four (4) named defendants ... Norwest Mortgage, Inc. ("Norwest"), Wells Fargo Home Mortgage, Inc. ("Wells Fargo"), Allstate Insurance Company (Allstate") and Garner (LF:9).

Garner's registered agent was hand served with process by The Sheriff of St. Charles County, Missouri, at Garner's registered office on August 23, 2001 (LF:38-42).

The Clerk of The Circuit Court of The City of St. Louis, Missouri, either lost or mis-filed the St. Charles County Sheriff's return of service on Garner. Although not routine, this was not an uncommon circumstance. Internal Clerk procedures dealing with the proper filing of court documents, the recording of accurate and complete court minutes of proceeding/filings, accounting for money deposited in the Court registry, etc. are not always followed. See, e.g., Post-Dispatch Newspaper March 19, 2003 article entitled "St. Louis Circuit Clerk Gets Good Progress Report" (Addendum page 1) wherein Clerk Favazza and Missouri Auditor Claire McCaskill agree the Circuit Court Of The City of St. Louis records are inaccurate for money deposited prior to 1999 based upon poor record-keeping in The Clerk's Office.

The trial court, not being aware that service had been made, dismissed Estes' claims against Garner without prejudice on January 18, 2002 for failure to obtain service (LF:2). Estes refiled a true copy of the return of service documents July 15, 2002 (LF:37-42) and got an order vacating the January 18, 2002 dismissal of Garner (LF:48). Estes did not serve notice upon Garner respecting either the motion to vacate or the July 15, 2002 vacation order because Garner, being a party in default for failure to appear, was

not entitled to notice under Rule 43.01(a) ["... no service need be made on parties in default for failure to appear ..."].

Allstate was dismissed out of the suit by order dated November 1, 2001 (LF:36). Estes' claims against Norwest and Wells Fargo were voluntarily dismissed, without prejudice, prior to the Garner August 2, 2002 default judgment hearing (LF:49).

Garner failed to appear and was in default for more than 10 months and 22 days as of August 2, 2002. After evidentiary hearing August 2, 2002, the trial court entered a Final Judgment (LF:52) in the amount of \$200,000.00 in favor of Estes and against Garner thereby disposing of all parties and all issues in the litigation.

On August 26, 2002, Garner first appeared by filing a document styled Motion To Set Aside Default Judgment And For Sanctions (LF:55)("Set-Aside Motion"). Set-Aside Motion was not verified and no affidavit, exhibit or other evidence was offered in support of its' allegations.

Garner's Set-Aside Motion solely relied upon Rule 74.05(d) for its' relief from the August 2, 2002 Final Judgment (LF:55 ¶1).

Garner's Set Aside Motion ¶9 (LF:56) alleged : "Garner was unaware of the motion to set aside the court's 1/18/02 order, or the Motion For Default Judgment, to enable it to appear and defend itself, and, therefore, has good cause for not answering the Petition or being present at the motions". Garner made no other "good cause" allegation in its' Set Aside Motion.

Garner did not offer any facts (or, for that matter, any conclusions) "why" Garner was in default for more than 10 months and 22 days at the time of the August 2, 2002

default hearing ... no explanation whatsoever was given respecting the reasons for the default. See, Set Aside Motion ¶5-¶8 (LF:55-56).

Set-Aside Motion was argued October 25, 2002 ... and, on November 1, 2002 the trial court entered its' Order granting Set-Aside Motion and imposing a \$1,000.00 monetary sanction upon Estes' legal counsel for not giving Garner notice of the default proceedings (LF:71).

The trial court granted Garner relief purportedly under authority of Rule 74.05(d), Rule 74.06(b)(3) [irregular judgment] and Rule 54.22(b). The Rule 74.06(b)(3) [irregular judgment] and Rule 54.22(b) findings were *sua sponte* gratuitous because Garner's Set-Aside Motion did not seek relief under those rules nor did Garner allege the service of process upon Garner was irregular or insufficient.

To date, Garner has not filed a motion to file an out-of-time Answer ... and, has not filed or exhibited the text of any document purporting to be Garner's Answer herein.

Garner did not file a notice of appeal from the August 2, 2002 Final Judgment.

Estes filed a timely Notice of Appeal from the November 1, 2002 Order on November 7, 2002 (LF:81).

This is an appeal from a final civil judgment of The Circuit Court of The City of St. Louis, Missouri. Therefore, this appeal is within the general appellate jurisdiction of The Missouri Court of Appeals, Eastern Division, as set forth in Article V, Section 3 of The Missouri Constitution (as amended to date). None of the grounds, which under The Missouri Constitution would confer exclusive original upon The Missouri Supreme Court,

are present or alleged in this appeal, hence, the appellate jurisdiction of The Missouri Court of Appeals, Eastern District, is invoked. This appeal followed.

Estes' Show Cause Response

(A) General Remarks :

On March 5, 2003, this Court ordered Estes to Show Cause why this appeal should not be dismissed for lack of a final, appealable judgment under Klaus v. Shelby, 4 S.W.3d 635, 637-38 (Mo. App. E.D. 1999)("Klaus").

The "Show Cause" issue necessarily involves an analysis respecting the scope and interrelationship of Rule 74.05(d), Rule 75.01, Rule 78.06 and Rule 81.05(a). Garner premised its' motion solely on Rule 74.05(d). See LF:55 ¶1.

Certain legal principles are not disputed. For example, the trial court's subject matter jurisdiction to set aside, modify or otherwise change the August 2, 2002 Final Judgment terminated 30 days after August 2, 2002 under Rule 75.01 unless the 30 day time period was extended by some other rule. Quality Business v. National Business, 880 S.W.2d 333, 335 (Mo. App. E.D. 1994). It is also acknowledged (although not relevant in the case *sub judice* because the instant case involves a default judgment specially provided for in Rule 74.05[d]) one theoretical mechanism which might extend the otherwise 30 day Rule 75.01 time limit would be the filing of "an authorized after trial motion" under Rule 78.06 and Rule 81.05(a) to gain access to the 90 day rule. Klaus dealt with this subject matter.

The above principles are important in this appeal because if either (a) the trial court lacked Rule 75.01 subject matter jurisdiction to enter the November 1, 2002 order or (b) the Set-Aside Motion filing is treated as an independent action under Rule 74.05[d] upon which a final judgment was entered November 1, 2002 (LF:71), then, in either circumstance this Court unquestionably has appellate review jurisdiction in the appeal *sub judice*.

Estes contends this Court does have appellate review jurisdiction on two independent theories, to wit :

- (a) The Klaus rule does not apply because Garner's August 26, 2002 Set-Aside Motion was a legal nullity in that it wholly lacked the *de minimus* Rule 74.05(d) "good cause" and "meritorious defense" factual allegations essential to invoke the subject matter jurisdiction of the trial court to decide whether to adjudicate a Garner Rule 81.05(a) or Rule 78.06 "rehearing" or "new trial" issue. The motion simply did not invoke a Klaus "rehearing" or "new trial" justiciable issue ... and, therefore, Klaus's 90 day extension of the trial court's Rule 75.01 authority and jurisdiction to act on a viable set aside motion does not apply as a matter of law. This Court, accordingly, has appellate review jurisdiction to determine whether the November 2, 2002 Order is either (a) void for want of trial court Rule 75.01 jurisdiction or (b) a final, appealable judgment on a Rule 74.05[d] independent action commenced by Garner within one year after entry of the August 2, 2002 Final Judgment; or, alternatively,

(b) Whether Klaus overlooked the special treatment accorded default judgment set-asides under Rule 74.05(d) or Klaus misapplied Taylor v. United Parcel Service, 854 S.W.2d 390 (Mo. banc 1993). If The Court determines Set-Aside Motion was sufficient to raise justiciable default judgment set aside issues, then, in that event Garner's Set-Aside Motion is an independent action under Rule 74.05(d) upon which a "final judgment" (i.e. November 1, 2002 Order) was entered ... and, Estes' November 7, 2002 Notice of Appeal (LF:81) thereby was timely and sufficient to confer appellate review jurisdiction upon this Court. See, Clark v. Brown, 794 S.W.2d 254 (Mo. App. S.D. 1990); Sprung v. Negwer Materials, 727 S.W.2d 883 (Mo. banc 1987).

(B) Klaus Does Not Apply - Set-Aside Motion Did Not Raise A Justiciable Issue :

For the reasons expressed below, Estes contends the Set-Aside Motion was a legal nullity ... legally worthless pieces of paper upon which no trial court could properly base Rule 74.05(d) subject matter jurisdiction upon ... and, legally insufficient as a matter of law to be construed as a "new trial motion" or "motion for rehearing" upon which trial court Rule 75.01 jurisdiction might be extended beyond thirty (30) days post-August 2, 2002 under either Rule 78.06 or Rule 81.05(a).

Garner's Set-Aside Motion was facially defective by failing to plead "facts" showing Garner had "good cause" for being in default or facts showing Garner had a "meritorious defense" to Estes' claims. These are the essential elements necessary to invoke trial court default set-aside jurisdiction. Rule 74.05(d).

For example, Set-Aside Motion (LF:55) makes no allegation to explain "why" Garner was in default for 10 months and 22 days ... i.e. no Rule 74.05(d) "good cause" allegation whatsoever.

Garner's Set Aside Motion ¶9 (LF:56) does allege Garner had "good cause" because it was not served with motion or notice of the January 18, 2002 dismissal set aside or the August 2, 2002 default hearing. But, facially, this does not rise to "good cause" because a party in default for failure to appear (i.e. Garner) is not entitled to service of pleadings or notice of hearings under Rule 43.01(a). Citizens National Bank v. Boatmen's National Bank, 934 S.W.2d 6, 8-9 (Mo. App. E.D. 1996).

Nor does Set-Aside Motion plead "facts" demonstrating a "meritorious defense" ... instead, all Set-Aside Motion (LF:55) offers is ineffectual legal conclusions. See, e.g., Set Aside Motion ¶10 (Garner "cannot be liable"), ¶11 ("fails to state a cause of action" without stating factual reasons), ¶12 ("no duty" and "no privity" without factual support). Harris v. Mitchell Transport, Inc., 812 S.W.2d 183, 184 (Mo. App. E.D. 1991)("the court should insist on a specific recitation of particular facts which, if proven, would constitute a meritorious defense")

See, e.g., Citizens National Bank v. Boatmen's Bank, 934 S.W.2d 6, 8-9 (Mo. App. E.D. 1996)("... we need not reach that issue because the Libermans' motion to set aside the default and inquiry was facially defective. Under Rule 74.05, upon motion stating facts constituting a meritorious defense and for good cause shown, the setting aside of an interlocutory order of default is left to the discretion of the trial court ... Nowhere in their motion do the Liebermans state any facts constituting a meritorious defense or showing

good cause for their failure to file a response to the original creditor's bill or Boatmen's counterclaim. In fact, they completely fail to address their failure to respond. We are unable to conclude therefore that the Liebermans made the requisite showing."); Distribution Transportation v. Salihovic, 2 S.W.3d 822, 824 (Mo. App. E.D. 1999)("In order for this Court to set aside a default judgment, the motioning party must include facts, within the motion to set aside constituting a meritorious defense. (Citation omitted). Salihovic's motion to set aside does not contain any facts which would establish a meritorious defense from the default judgment. Since he failed to establish a meritorious defense within the motion to set aside the default judgment, the trial court did not err in denying Salihovic's motion."); Stradford v. Caudillo, 972 S.W.2d 483, 485 (Mo. App. 1998)("...Caudillo's motion did not state facts constituting good cause. Therefore, Caudillo did not meet the pleading requirements of Rule 74.05(d), and she was not entitled to an evidentiary hearing."); Sears v. Dent Wizard, 13 S.W.3d 661, 664-665 (Mo. App. E.D. 2000)("Under the explicit terms of Rule 74.05(d), a motion to set aside a default judgment must state facts constituting both a meritorious defense and good cause for the default"): Great American Acceptance v. Zwego, 902 S.W.2d 859, 863 (Mo. App. 1995)(In finding a failure to sufficiently plead "facts" showing "good cause", The Court reasoned "There are no facts given to explain why nothing was done by Zwego's attorney between time of service on August 14, 1992, and thirty days later when the answer was due ... There was no abuse of discretion committed by the court in entering a default as to liability"); Harris v. Mitchell Transport, Inc., 812 S.W.2d 183, 184 (Mo. App. E.D.

1991)("The court should insist on a specific recitation of particular facts which, if proven, would constitute a meritorious defense").

Further a pleading is insufficient under Rule 74.05(d) unless it alleges facts, which if proven, satisfy both the "good cause" and "meritorious defense" Rule 74.05(d) essential elements. Brants v. Foster, 926 S.W.2d 534, 535 (Mo. App. 1996)("Rule 74.05[d] requires assertion of sufficient facts to constitute both a meritorious defense and good cause shown. [Citation omitted]. Failure to establish either one of these elements negates the necessity of considering the other."); Harris v. Mitchell Transport, Inc., 812 S.W.2d 183, 184 (Mo. App. E.D. 1991)("Because the rule requires sufficient facts to constitute both a meritorious defense and good cause shown, a failure to establish one of these elements negates the necessity of considering the other".).

Just seven weeks ago this Court had occasion to rely upon the legal principles now relied upon by Estes in this appeal. In Hinton v. Proctor & Schwartz, __ S.W.3d __ (Mo. App. E.D. 2003), Appeal ED80700, Op. January 14, 2003, this Court stated "The party moving to set aside a default judgment has the burden of proof to convince the trial court that the party is entitled to relief", "To determine compliance with the pleading requirements of Rule 74.05(d), we look to the allegations in the defaulting party's motion, and such other documents as affidavits, exhibits and proposed answers", "Bare statements amounting to mere speculations or conclusions fail to meet the pleading requirements", "A motion to set aside a judgment cannot prove itself" and "The motion must be verified or supported by affidavits or sworn testimony produced at the hearing on the motion".

The Klaus opinion does not disclose the content or text of the motion to set aside the default judgment. But, implicit in The Court's ruling, is the proposition that the Klaus motion to set aside was legally sufficient to raise justiciable issues of fact on both the "good cause" and "meritorious defense" Rule 74.05(d) prerequisites.

That is the distinguishing factor here. Here, Garner's Set-Aside Motion is facially defective and inadequate as a matter of law to raise any justiciable Rule 74.05(d) issue. For these reasons, Klaus does not apply ... and, this Court now has appellate review jurisdiction to decide whether the trial court acted beyond its' Rule 75.01 subject matter jurisdiction when it entered the November 1, 2002 set aside order.

(C) Klaus Overlooked Special Rule 74.05(d) Treatment of Default Judgment Set-Asides and Is In Conflict With Other Appellate Decisions :

Klaus misapplied Taylor v. United Parcel Service, 854 S.W.2d 390 (Mo. banc 1993) and is contrary to the express language of Rule 74.05(d) and the holding in Clark v. Brown, 794 S.W.2d 254 (Mo. App. S.D. 1990).

The nexus of the complaint expressed by Estes in this subsection is the following Klaus language : "We find a motion to set aside a default judgment is an authorized after trial motion (Sic: under Rule 78.06 and Rule 81.05[a]) which extends the trial court's control (Sic: under Rule 75.01) over the default judgment to ninety days from the date the motion is filed". Klaus v. Shelby, 4 S.W.3d at 637. And, "during this ninety day period, the trial court has the same control over the judgment as under Rule 75.01". Id. Klaus relied upon a passage from Taylor v. United Parcel Service, 854 S.W.2d 390 (Mo. banc 1993) which quoted with approval the following language from In Re Franz Estate, 221 S.W.2d 739, 740 (Mo. 1949) ... "a motion to set aside a default judgment was nothing more than a

motion asking the trial court to reconsider its ruling and to set aside its dismissal order. It was, in fact, simply a motion for rehearing or new trial". Klaus v. Shelby, 4 S.W.3d at 637-38. Close analysis of Taylor suggests Klaus misapplied and misinterpreted Taylor.

First, Taylor was a summary judgment case and not a default judgment case. Taylor ruled a post judgment reconsideration motion was an "authorized after trial motion" for the purpose of applying Rule 81.05(a)'s mandate re establishment of the date for filing a timely notice of appeal. Taylor specifically held : "These rules (Sic: Rule 75.01 and Rule 81.05[a]), read together, clearly say that an initial judgment entered by a trial court remains open for a minimum of thirty days unless the trial court overrules a motion for new trial prior to the expiration of thirty days. In that event, the judgment becomes final for purposes of appeal when the motion for new trial is ruled. Rule 75.01 does not require a contrary result. Even if the trial court overrules a motion for new trial and judgment becomes final for purposes of appeal prior to expiration of thirty days following entry of judgment, the trial court retains its Rule 75.01 authority until the thirty days expires. This is the import of the final sentence of Rule 75.01. `The thirty day period after entry of judgment ... is not shortened by the filing of a notice of appeal'"(Emphasis in original text), Taylor v. United Parcel Service, 854 S.W.2d at 392.

Taylor did not involve or decide the controlling issue in the case *sub judice* respecting whether a Franz default set aside motion post January 1, 1988 continued to be an "authorized after trial motion" which extends a trial court's Rule 75.01 authority for the ninety day period provided for in Rule 81.05(a). But, Klaus erroneously assumed Taylor was controlling precedent on this issue.

For example, Klaus states "We decline to follow these cases (Sic: including Clark) because the Supreme Court in Taylor held a Motion To Set Aside A Default Judgment is an authorized after trial motion and ... ", Klaus v. Shelby, 4 S.W.3d at 637 n.2. As shown above, this conclusion is not accurate.

Second, a sound legal basis exists suggesting The Supreme Court will not post January 1, 1988 approve of the Franz reasoning that a default set aside motion is an "authorized after trial motion" which extends a trial court's Rule 75.01 authority for the ninety day period provided for in Rule 81.05(a). If that is true Klaus clearly reached the wrong result.

Estes respectfully suggests Franz, and the reasoning in Klaus, became irrelevant when Rule 74.05(c), now Rule 74.05(d), was adopted effective January 1, 1988. Under the "new" post-January 1, 988 rules the setting aside of default judgments were specifically and specially treated distinct from other post trial motions. The new rules provided the "good cause" and "meritorious defense" essential elements for set aside ... and, importantly, changed the nature and time period for obtaining default set aside relief. Under the new rules, the motion to set aside default was a separate, independent action that had to be filed within a reasonable period of time not to exceed one (1) year.

Klaus is contrary to and in direct conflict with the holding in Clark v. Brown, 794 S.W.2d 254 (Mo. App. S.D. 1990) and the Western District's holding in Moore v. Baker, 982 S.W.2d 286, 288 (Mo. App. W.D. 1998)("A court's judgment to grant or to deny a motion to set aside a default judgment is independent of the underlying judgment").

Clark observed "That rule (Sic: Rule 74.05[d]) now provides for one year after entry of the default for the filing of a motion to set aside the default. This new time provision serves to sharply distinguish motions to set aside default judgments from motions for new trial and other motions in the nature thereof. The later motions must be filed within 15 days after judgment (Sic: the "old" time period in 1990) and will be automatically denied if not otherwise ruled at the end of 90 days. These time limitations cannot logically apply to motions to set aside defaults, which now may be filed as long as one year after the rendition of the default". Clark v. Brown, 794 S.W.2d at 256.

In rejecting the Klaus-type notion that a motion to set aside a default judgment was in the nature of a Rule 81.05 "authorized after trial motion" subject to the ninety day limitation of Rule 81.05, Clark held : "Under this conception as to the nature of a motion to set aside a default judgment, the proceeding is an independent action and cannot terminate automatically after 90 days any more than a new suit in equity would so terminate". Id. In accord, Moore v. Baker, 982 S.W.2d at 288 (Mo. App. W.D. 1998)("A court's judgment to grant or to deny a motion to set aside a default judgment is independent of the underlying judgment").

Therefore, under Clark, Moore and Rule 74.05(d), Garner's August 27, 2002 Set-Aside Motion (LF:55) was an independent action not constrained by the Rule 81.05(a) and Rule 78.06 time limitation.

The trial court, therefore, within the constraints of Rule 74.05(d), had jurisdiction to decide the Set-Aside Motion on its merits without regard to time limitation. The trial court accepted jurisdiction and ruled November 1, 2002 (LF:71). This was a final,

appealable judgment under Rule 74.05(d). Estes filed a timely notice of appeal November 11, 2002 thereby conferring appellate review jurisdiction upon this Court.

(D) In The Alternative, This Cause Should Be Transferred To The Supreme Court Under Rule 83.01:

As shown above, Estes contends Klaus is contrary to and in conflict with Rule 74.05(d), the Southern District's decision in Clark v. Brown, 794 S.W.2d 254 (Mo. App. S.D. 1990) and the Western District's holding in Moore v. Baker, 982 S.W.2d 286, 288 (Mo. App. W.D. 1998).

If The Court is not persuaded it has appellate review jurisdiction in this appeal, Estes respectfully requests this Court to exercise its discretion and transfer this appeal to The Missouri Supreme Court under Rule 83.02 on the grounds (a) this appeal involves Rule 74.05[d] issues of general interest and importance, (b) existing law on the subject matter discussed in this Statement of Jurisdiction should be re-examined and finally decided by The Supreme Court and (c) Klaus is in conflict with Rule 74.05[d] and the Southern District's holding in Clark v. Brown, 794 S.W.2d 254 (Mo. App. S.D. 1990) and the Western District's holding in Moore v. Baker, 982 S.W.2d 286, 288 (Mo. App. W.D. 1998)("A court's judgment to grant or to deny a motion to set aside a default judgment is independent of the underlying judgment").

Conclusion

Based upon the above points, authorities and arguments, this Court has appellate review jurisdiction in this appeal.

III.

Statement of Facts

On August 9, 2001, Estes filed a three count Petition (LF:9). Petition Count I was on a negligence tort theory, Count II was for negligent infliction of emotional harm and Count III was in tort for breach of fiduciary duties. Id.

The Petition originally involved four (4) named defendants ... Norwest Mortgage, Inc. ("Norwest"), Wells Fargo Home Mortgage, Inc. ("Wells Fargo"), Allstate Insurance Company (Allstate") and Garner Real Estate Marketing Specialist, Inc. ("Garner")(LF:9).

Garner's registered agent was hand served with process by The Sheriff of St. Charles County, Missouri, at Garner's registered office on August 23, 2001 (LF:38-42).

The Clerk of The Circuit Court of The City of St. Louis, Missouri, either lost or mis-filed the St. Charles County Sheriff's return of service on Garner. The trial court, not being aware that service had been made, dismissed Estes' claims against Garner without prejudice on January 18, 2002 for failure to obtain service (LF:2). Estes refiled a true copy of the return of service documents July 15, 2002 (LF:37-42) and got an order vacating the January 18, 2002 dismissal of Garner (LF:48).

Estes did not serve notice upon Garner respecting either the motion to vacate or the July 15, 2002 vacation order because Garner, being a party in default for failure to appear, was not entitled to notice under Rule 43.01(a) ["... no service need be made on parties in default for failure to appear ..."].

Allstate was dismissed out of the suit by order dated November 1, 2001 (LF:36). Estes' claims against Norwest and Wells Fargo were voluntarily dismissed, without prejudice, prior to the Garner August 2, 2002 default judgment hearing (LF:49).

Garner failed to appear and was in default for more than 10 months and 22 days as of August 2, 2002. After evidentiary hearing August 2, 2002, the trial court entered a Final Judgment (LF:52) in the amount of \$200,000.00 in favor of Estes and against Garner thereby disposing of all parties and all issues in the litigation.

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Garner's Set-Aside Motion solely relied upon Rule 74.05(d) for its' relief from the August 2, 2002 Final Judgment (LF:55 ¶1).

Garner's Set Aside Motion ¶9 (LF:56) alleged : "Garner was unaware of the motion to set aside the court's 1/18/02 order, or the Motion For Default Judgment, to enable it to appear and defend itself, and, therefore, has good cause for not answering the Petition or being present at the motions". Garner made no other "good cause" allegation in its' Set Aside Motion.

Garner did not offer any facts (or, for that matter, any conclusions) "why" Garner was in default for more than 10 months and 22 days at the time of the August 2, 2002 default hearing ... no explanation whatsoever was given respecting the reasons for the default. See, Set Aside Motion ¶5-¶8 (LF:55-56).

Set-Aside Motion was argued October 25, 2002 ... and, on November 1, 2002 the trial court entered its' Order granting Set-Aside Motion and imposing a \$1,000.00 monetary sanction upon Estes' legal counsel for not giving Garner notice of the default proceedings (LF:71).

The trial court granted Garner relief purportedly under authority of Rule 74.05(d), Rule 74.06(b)(3) [irregular judgment] and Rule 54.22(b). The Rule 74.06(b)(3) [irregular judgment] and Rule 54.22(b) findings were *sua sponte* gratuitous because Garner's Set-Aside Motion did not seek relief under those rules nor did Garner allege the service of process upon Garner was irregular or insufficient.

To date, Garner has not filed a motion to file an out-of-time Answer ... and, has not filed or exhibited the text of any document purporting to be Garner's Answer herein.

Garner did not file a notice of appeal from the August 2, 2002 Final Judgment.

Estes filed a timely Notice of Appeal from the November 1, 2002 Order on November 7, 2002 (LF:81) and this appeal followed.

IV. **Points Relied On**

Point I.

The trial court committed prejudicial err by entering the November 1, 2002 Order setting aside the August 2, 2002 Final Judgment because (1) the trial court exceeded its subject matter jurisdiction and (2) clearly abused its' judicial discretion in that (a) the trial court had no Rule 75.01 subject matter jurisdiction since the November 1, 2002 order was entered more than 30 days after entry of the August 2, 2002 Final Judgment, (b) Garner's set aside motion failed to plead ultimate facts demonstrating "good cause" for Garner's default status and a "meritorious defense" to Estes' claims sufficient to invoke Rule 74.05[d] relief, (c) the trial court improperly entered the November 1, 2002 order without hearing or receipt of any evidence to *prima facie* establish the "good cause" and "meritorious

defense" essential elements for Rule 74.05[d] relief and (d) the trial court *sua sponte* improperly went beyond the scope of Garner's set aside motion allegations and improperly acted as an advocate for Garner by granting Garner relief on Rule 54.22[b] and Rule 74.06[b][3] theories not pled by Garner and not *prima facie* established by competent and substantial evidence.

The three most apposite cases are :

Clark v. Brown, 794 S.W.2d 254 (Mo. App. S.D. 1990)

Hinton v. Proctor, __ S.W.3d __ (Mo. App. E.D. 2003), ED80700, Op. 1/14/03

Moore v. Baker, 982 S.W.2d 286 (Mo. App. W.D. 1998)

Other cited authority :

Brants v. Foster, 926 S.W.2d 534 (Mo. App. 1996)

Citizens Nat'l Bank v. Boatmen's Bank, 934 S.W.2d 6 (Mo. App. E.D. 1996)

Coteleur v. Danzinger, 870 S.W.2d 234 (Mo. banc 1994)

Dallas-Johnson Properties v. Hubbard, 823 S.W.2d 5 (Mo. App. E.D. 1991)

Distribution Transportation v. Salihovic, 2 S.W.3d 822 (Mo. App. E.D. 1999)

Great American Acceptance v. Zwego, 902 S.W.2d 859 (Mo. App. 1995)

Great Southern Savings & Loan v. Wilburn, 887 S.W.2d 581 (Mo. banc 1994)

Harris v. Mitchell Transport, Inc., 812 S.W.2d 183 (Mo. App. E.D. 1991)

Hoffman v. Quality Chrysler Plymouth Sales, 706 S.W.2d 576 (Mo. App. 1986)

Laser Vision v. Laser Vision International, 930 S.W.2d 29 (Mo. App. E.D. 1996)

Quality Business v. National Business, 880 S.W.2d 333 (Mo. App. E.D. 1994)

Sears v. Dent Wizard, 13 S.W.3d 661 (Mo. App. E.D. 2000)

State ex rel Chemical Dynamics v. Luten, 581 S.W.2d 921 (Mo. App. E.D. 1979)

Stradford v. Caudillo, 972 S.W.2d 483 (Mo. App. 1998)

Rule 43.01(a)

Rule 54.22(b)

Rule 74.05(d)

Rule 74.06(b)(3)

Point II.

The trial court committed prejudicial err by entering the November 1, 2002 Order imposing a \$1,000 sanction upon Estes' legal counsel because (1) the trial court exceeded its subject matter jurisdiction and (2) clearly abused its' judicial discretion in that (a) Estes' legal counsel merely acted, in good faith, in accordance with the Missouri Rules Of Civil Procedure, (b) at all time from September 24, 2001 to the current date Garner was in default for failure to appear, (c) Estes and her legal counsel were not required under Rule 43.01[a] to serve the July 15, 2002 motion to set aside the January 18, 2002 dismissal of Garner for failure to prosecute or give Garner notice of hearing thereon since Garner was then in default for failure to appear and no new Petition claims were being asserted against Garner, (d) Estes and her legal counsel were not required under Rule 43.01[a] to serve the July 16, 2002 motion for default judgment against Garner or give Garner notice of hearing thereon August 2, 2002 since Garner was then in default for failure to appear and no new Petition claims were being asserted against Garner and (e) the July 15, 2002 set aside of the January 18, 2002 dismissal of Garner for failure to prosecute was proper since the St. Charles County Sheriff's August 23, 2002 return of personal service upon Garner was lost or misplaced by the Clerk of The Circuit Court of The City of St. Louis through no fault of Estes or her legal counsel.

The most apposite cases are :

Citizens Nat'l Bank v. Boatmen's Nat'l Bank, 934 S.W.2d 6 (Mo. App. E.D. 1996)

Long v. Cross Rep't Serv., __ S.W.3d __ (Mo. App. W.D. 2003), WD61272, Op. 2/25/03

Rule 43.01(a)

Rule 55.03

V. **Argument**

Point I.

The trial court committed prejudicial err by entering the November 1, 2002 Order setting aside the August 2, 2002 Final Judgment because (1) the trial court exceeded its subject matter jurisdiction and (2) clearly abused its' judicial discretion in that (a) the trial court had no Rule 75.01 subject matter jurisdiction since the November 1, 2002 order was entered more than 30 days after entry of the August 2, 2002 Final Judgment, (b) Garner's set aside motion failed to plead ultimate facts demonstrating "good cause" for Garner's default status and a "meritorious defense" to Estes' claims sufficient to invoke Rule 74.05[d] relief, (c) the trial court improperly entered the November 1, 2002 order without hearing or receipt of any evidence to *prima facie* establish the "good cause" and "meritorious defense" essential elements for Rule 74.05[d] relief and (d) the trial court *sua sponte* improperly went beyond the scope of Garner's set aside motion allegations and improperly acted as an advocate for Garner by granting Garner relief on Rule 54.22[b] and Rule 74.06[b][3] theories not pled by Garner and not *prima facie* established by competent and substantial evidence.

(A) Standard of Review :

Whether the trial court exceeded its' subject matter jurisdiction or misapplied relevant and applicable law by entering the November 1, 2002 order presents a pure question of law that is reviewed *de novo* and independently on appeal without giving any deference to the trial court. Laser Vision Centers v. Laser Vision International, 930 S.W.2d 29, 31 (Mo. App. E.D. 1996); Hinton v. Proctor & Schwartz, __ S.W.3d __ (Mo. App. E.D. 2003), Appeal ED80700, Op. January 14, 2003.

The trial court's jurisdiction and the scope of review was limited to issues properly presented in a Rule 74.05(d) motion. Cotleur v. Danzinger, 870 S.W.2d 234 (Mo. banc 1994); State ex rel Chemical Dynamics v. Luten, 581 S.W.2d 921 (Mo. App. E.D. 1979).

If Garner did not sufficiently plead a claim for relief under Rule 74.05(d), then, in that event, the trial court had no judicial discretion to exercise other than to deny Garner's Set Aside Motion. Citizens National Bank v. Boatmen's Bank, 934 S.W.2d 6, 8-9 (Mo.

App. E.D. 1996); Sears v. Dent Wizard, 13 S.W.3d 661 (Mo. App. E.D. 2000); Harris v. Mitchell Transport, Inc., 812 S.W.2d 183 (Mo. App. E.D. 1991).

(B) Garner's Set Aside Motion Failed To Plead Ultimate Facts Demonstrating Rule 74.05(d) "Good Cause" or A "Meritorious Defense" - Therefore, Trial Court Lacked Rule 74.05(d) Subject Matter Jurisdiction :

As a preliminary matter, Estes contends the Set-Aside Motion pleading (LF:55) allegations were insufficient to invoke Rule 74.05(d), and, therefore, the trial court had no judicially authorized discretion to exercise other than summary denial of Set-Aside Motion.

A Rule 74.05(d) motion must sufficiently plead "facts" showing "good cause" for the original default and "facts" showing a "meritorious defense" ... otherwise, Rule 74.05(d) is not properly invoked and the set-aside issues are not before The Court.

See, e.g., Citizens National Bank v. Boatmen's Bank, 934 S.W.2d 6, 8-9 (Mo. App. E.D. 1996)("... we need not reach that issue because the Liebermans' motion to set aside the default and inquiry was facially defective. Under Rule 74.05, upon motion stating facts constituting a meritorious defense and for good cause shown, the setting aside of an interlocutory order of default is left to the discretion of the trial court ... Nowhere in their motion do the Liebermans state any facts constituting a meritorious defense or showing good cause for their failure to file a response to the original creditor's bill or Boatmen's counterclaim. In fact, they completely fail to address their failure to respond. We are unable to conclude therefore that the Liebermans made the requisite showing."); Distribution Transportation v. Salihovic, 2 S.W.3d 822, 824 (Mo. App. E.D. 1999)("In order for this Court to set aside a default judgment, the motioning party must include

facts, within the motion to set aside constituting a meritorious defense. (Citation omitted). Salihovic's motion to set aside does not contain any facts which would establish a meritorious defense from the default judgment. Since he failed to establish a meritorious defense within the motion to set aside the default judgment, the trial court did not err in denying Salihovic's motion."); Stradford v. Caudillo, 972 S.W.2d 483, 485 (Mo. App. 1998)("...Caudillo's motion did not state facts constituting good cause. Therefore, Caudillo did not meet the pleading requirements of Rule 74.05(d), and she was not entitled to an evidentiary hearing."); Sears v. Dent Wizard, 13 S.W.3d 661, 664-665 (Mo. App. E.D. 2000)("Under the explicit terms of Rule 74.05(d), a motion to set aside a default judgment must state facts constituting both a meritorious defense and good cause for the default"): Great American Acceptance v. Zwego, 902 S.W.2d 859, 863 (Mo. App. 1995)(In finding a failure to sufficiently plead "facts" showing "good cause", The Court reasoned "There are no facts given to explain why nothing was done by Zwego's attorney between time of service on August 14, 1992, and thirty days later when the answer was due ... There was no abuse of discretion committed by the court in entering a default as to liability"); Harris v. Mitchell Transport, Inc., 812 S.W.2d 183, 184 (Mo. App. E.D. 1991)("The court should insist on a specific recitation of particular facts which, if proven, would constitute a meritorious defense").

Further a pleading is insufficient under Rule 74.05(d) unless it alleges facts, which if proven, satisfy both the "good cause" and "meritorious defense" Rule 74.05(d) essential elements. Brants v. Foster, 926 S.W.2d 534, 535 (Mo. App. 1996)("Rule 74.05[d] requires assertion of sufficient facts to constitute both a meritorious defense and good

cause shown. [Citation omitted]. Failure to establish either one of these elements negates the necessity of considering the other."); Harris v. Mitchell Transport, Inc., 812 S.W.2d 183, 184 (Mo. App. E.D. 1991)("Because the rule requires sufficient facts to constitute both a meritorious defense and good cause shown, a failure to establish one of these elements negates the necessity of considering the other".).

Estes contends Garner failed to sufficiently plead both Rule 74.05(d) elements.

Garner's Set Aside Motion ¶9 (LF:56) alleged : "Garner was unaware of the motion to set aside the court's 1/18/02 order, or the Motion For Default Judgment, to enable it to appear and defend itself, and, therefore, has good cause for not answering the Petition or being present at the motions". That's it !!! Garner made no other "good cause" allegation in its' Set Aside Motion.

Garner did not offer any facts (or, for that matter, any conclusions) "why" Garner was in default for more than 10 months and 22 days at the time of the August 2, 2002 default hearing ... no explanation whatsoever was given respecting the reasons for the original default. Instead, Garner complains of judicial proceedings (set aside hearings, default hearing, etc.) after Garner was in default. Set Aside Motion ¶5-¶8 (LF:55-56).

This is exactly the erroneous argument advanced by Defendant Lieberman and rejected by this Court in Citizens National Bank v. Boatmen's National Bank, 934 S.W.2d 6 (Mo. App. E.D. 1996). The court found Lieberman's set aside motion "facially defective" because it failed to allege any facts showing "good cause" for Lieberman's failure to timely respond to the Petition allegations after original service ... i.e. failed to allege reasons for the original default. Id. at 8-9. And, "Once a defendant is served with

summons and petition, he is put on notice of every stage of the proceeding. [Citation omitted]. If a defendant fails to file a timely pleading, plaintiff may obtain an interlocutory judgment of default. Then, damages are assessed and final judgment is entered. No additional notice is required between these two stages.". Id. 9.

Garner's "lack of notice" re post-service hearings is facially erroneous also under the explicit wording of Rule 43.01(a) : "... no service need be made on parties in default for failure to appear ...".

There is yet another fundamental reason "why" Garner does not qualify for Rule 74.05(d) relief ... it was in default too long (10 months 22 days) to even raise the predicate "good cause" argument.

The Missouri Supreme Court in Great Southern Savings & Loan v. Wilburn, 887 S.W.2d 581 (Mo. banc 1994) stated two rules relevant in the case *sub judice*. First, that for purposes of Rule 74.05(d) a "defaulted defendant shows good cause by proving that he or she did not recklessly or intentionally impede the judicial process". Id. at 584. Secondly, a litigant recklessly and intentionally impeded the judicial process by not responding the Petition within 35 days after service of process, and, therefore, Rule 74.05(d) relief was not appropriate. Id..

Another Court was more blunt ... in Stradford v. Caudillo, 972 S.W.2d 483, 486 (Mo. App. 1998) the Court held : "When a litigant chooses to ignore or act in reckless disregard of the rules and procedures set out for the orderly administration of the judicial process, he cannot be heard to complain when he receives no relief under its rules, particularly Rule 74.05(d)".

See, also, Citizens National Bank v. Boatmen's National Bank, 934 S.W.2d at 9 ("Certainly, the length of time the Liebermans were in default would be a factor the trial court could consider ... Where the facts establish willful, contumacious disregard for the authority of the court, applying sanctions ... or entering judgment by default is within the trial court's discretion.").

Here, the 10 month 22 day period of time (up to Final Judgment on August 2, 2002) *per se* shows Garner does not have Rule 74.05(d) "good cause" for being in default. Id.

Therefore, since Garner did not plead any facts rising to the level of showing "good cause" for being in default ... and, cannot show such facts due to length of time Garner was in default ... the trial court acted outside its' proper jurisdiction by not summarily denying Garner's Set Aside Motion on the ground it failed to invoke the Court's discretion under Rule 74.05(d).

Similarly, Garner failed to plead "facts" showing a "meritorious defense" ... instead, Garner merely alleged insufficient legal conclusions without factual support. See, e.g., Set Aside Motion ¶10 (Garner "cannot be liable"), ¶11 ("fails to state a cause of action" without stating factual reasons), ¶12 ("no duty" and "no privity" without factual support). LF:56.

These allegations are insufficient as a matter of law to invoke Rule 74.05(d) jurisdiction by failing to state the particularized facts necessary to reach the legal conclusions asserted. See, e.g., Harris v. Mitchell Transport, Inc., 812 S.W.2d 183, 184 (Mo. App. E.D. 1991)("the court should insist on a specific recitation of particular facts

which, if proven, would constitute a meritorious defense"); Brants v. Foster, 926 S.W.2d 534 (Mo. App. 1996); Distribution Transportation v. Salihovic, 2 S.W.3d 822, 824 (Mo. App. E.D. 1999)("In order for this Court to set aside a default judgment, the motioning party must include facts, within the motion to set aside constituting a meritorious defense. (Citation omitted). Salihovic's motion to set aside does not contain any facts which would establish a meritorious defense from the default judgment. Since he failed to establish a meritorious defense within the motion to set aside the default judgment, the trial court did not err in denying Salihovic's motion.").

Finally, if Garner failed to adequately plead either "good cause" or a "meritorious defense", then, as a matter of law the trial court was required to deny Set Aside Motion because Rule 74.05(d) jurisdiction depends upon Garner sufficiently pleading both "good cause" and a "meritorious defense" to invoke Rule 74.05(d) discretionary review. Harris v. Mitchell Transport, Inc., 812 S.W.2d 183 (Mo. App. E.D. 1991);Brants v. Foster, 926 S.W.2d 534 (Mo. App. 1996).

Here, it has been shown that Garner wholly failed to even come close to sufficiently alleging either "good cause" or a "meritorious defense".

It was impossible for Garner to make a *prima facie* Rule 74.05(d) default judgment set side case. In Hinton v. Proctor & Schwartz, __ S.W.3d __ (Mo. App. E.D. 2003), Appeal ED80700, Op. January 14, 2003, this Court stated "The party moving to set aside a default judgment has the burden of proof to convince the trial court that the party is entitled to relief", "To determine compliance with the pleading requirements of Rule 74.05(d), we look to the allegations in the defaulting party's motion, and such other

documents as affidavits, exhibits and proposed answers", "Bare statements amounting to mere speculations or conclusions fail to meet the pleading requirements", "A motion to set aside a judgment cannot prove itself" and "The motion must be verified or supported by affidavits or sworn testimony produced at the hearing on the motion".

Normally, a Rule 74.05(d) motion adequately alleges a "good cause" and "meritorious defense" paper case. Under those circumstances, "the circuit court is obligated to convene an evidentiary hearing to give the moving party an opportunity to prima facie establish good cause" by substantial and competent evidence, Moore v. Baker, 982 S.W.2d 286, 288 (Mo. App. W.D. 1998). This, of course, is a jurisdictional predicate to a Rule 74.05(d) set aside of a default judgment. Id.

Garner failed every one of the Hinton and Moore principles. The Set Aside Motion was not verified, no affidavit or other evidence was offered in support thereof, and the pleading failed to raise Rule 74.05(d) justiciable issues thereby denying Garner opportunity for hearing as a matter of law, See, e.g., Sears v. Dent Wizard, 13 S.W.3d 661 (Mo. App. E.D. 2000; Dallas-Johnson Properties v. Hubbard, 823 S.W.2d 5, 6 (Mo. App. E.D. 1991).

Since the Rule 74.05(d) essential elements cannot be *prima facie* established by evidentiary proof, it was prejudicial err for the trial court to do anything other than deny Garner's Set Aside Motion. Id.

The trial court misapplied applicable law, and acted outside its jurisdiction, by failing to summarily deny Garner's Set Aside Motion.

(C) Garner's Set Aside Motion Did Not Invoke Klaus "Authorized After Trial Motion" Theory :

The trial court's subject matter jurisdiction to set aside, modify or otherwise change the August 2, 2002 Final Judgment terminated 30 days after August 2, 2002 under Rule 75.01 unless the 30 day time period was extended by some other rule. Quality Business v. National Business, 880 S.W.2d 333, 335 (Mo. App. E.D. 1994).

"We find a motion to set aside a default judgment is an authorized after trial motion (Sic: under Rule 78.06 and Rule 81.05[a]) which extends the trial court's control (Sic: under Rule 75.01) over the default judgment to ninety days from the date the motion is filed". Klaus v. Shelby, 4 S.W.3d 635, 637 (Mo. App. E.D. 1999). And, "during this ninety day period, the trial court has the same control over the judgment as under Rule 75.01". Id.

But, here, Garner's Set-Aside Motion was so procedurally deficient as not to arise to the level of a Rule 74.05(d) motion ... much less a Klaus "authorized after trial motion". See, points, authorities and argument made at Statement of Jurisdiction, supra, which are hereby incorporated by reference.

Therefore, since the trial court's default judgment set aside order was entered more than the Rule 75.01 allowable 30 days post judgment August 2, 2002, the November 1, 2002 set aside order was outside and in excess of the trial court's subject matter jurisdiction and is void *per se*.

(D) Trial Court Acted Outside Its' Proper Jurisdiction By Premising November 1, 2002 Order on Rule 54.22(b) and Rule 74.06(b)(3) Theories :

The trial court lacked the Rule 75.01 jurisdictional discretion to set aside the August 1, 2002 Final Judgment on any ground it might decide to follow.

Instead, the trial court was limited to the theories and grounds properly raised in Garner's Set-Aside Motion. That's elementary.

But, the trial court violated these well-established legal principles by *sua sponte* conjuring up grounds to set aside the August 1, 2002 Final Judgment not relied upon by Garner.

For example, nowhere in Garner's Set-Aside Motion does it complain, assert or contend it was not validly and effectively served with legal process on August 23, 2001. Yet, the trial court *sua sponte* premised its November 1, 2002 set aside order in part on Rule 54.22(b) (LF:80). Obviously this was improper advocacy ... "improper" because there was no Garner allegation of either insufficient or fraudulent service of process ... and, was "improper" because a set aside under Rule 54.22(b) requires the party impeaching the sheriff's return of service to show lack of service by clear and convincing evidence (and, here there was no evidence or allegation to that effect). Hoffman v. Quality Chrysler Plymouth Sales, 706 S.W.2d 576, 580 (Mo. App. 1986); Hinton v. Proctor & Schwartz, *supra*.

The same is true of the trial court's *sua sponte* conjured up Rule 74.06(b)(3) "irregularity" ground for set aside. LF:80. Nowhere in Garner's Set-Aside Motion does it allege any ground for default set aside other than Rule 74.05. LF:55. And, there certainly was no evidence of "irregularity".

What the trial court complains about is the absence of a minute entry or document in the court file prior to July 15, 2002 showing service of process upon Garner. Yes, that's Estes' complaint too ... but, the fault lies with the Clerk of The Circuit Court in

misplacing or filing the return in the wrong case file (and, therefore, no minute entry would be made). There is no question the Sheriff of St. Charles County personally served Garner's registered agent August 23, 2001. See, LF:38-42. Recognizing the practicing St. Louis Law Community is cognizant that REAL CLERICAL PROBLEMS EXIST (i.e. lost files, lost money, inaccurate and absent minute entries, etc), and HAVE EXISTED FOR MANY YEARS in the Circuit Court of The City of St. Louis Clerk's Office, it is disingenuous for the trial court to even suggest the fault lies anywhere other than on the Clerk's shoulders for not having the St. Charles County Sheriff's return of service in the case file circa August 25, 2001 and thereafter. See, e.g., Post-Dispatch Newspaper March 19, 2003 article entitled "St. Louis Circuit Clerk Gets Good Progress Report" (Addendum page 1) wherein Clerk Favazza and Missouri Auditor Claire McCaskill agree the Circuit Court Of The City of St. Louis records are inaccurate for money deposited prior to 1999 based upon poor record-keeping in The Clerk's Office. If The Clerk can't keep track of money he receives, can we really depend upon The Clerk to keep track of court filed documents and to make accurate and timely court minute entries ? We think not.

In any event, Garner didn't complain about service of process ... so the trial court was without jurisdiction to consider it in this Rule 74.05(d) proceeding. Hinton v. Proctor & Schwartz, supra.

(E) Point I Conclusions :

Based upon the points, authorities and argument made in this Point I, the trial court committed prejudicial err by setting the August 1, 2002 Final Judgment (LF:52) aside in

the November 1, 2002 Order (LF:71). The November 1, 2002 order should be reversed and the trial court should be instructed to reinstate the August 1, 2002 Final Judgment.

Point II.

The trial court committed prejudicial err by entering the November 1, 2002 Order imposing a \$1,000 sanction upon Estes' legal counsel because (1) the trial court exceeded its subject matter jurisdiction and (2) clearly abused its' judicial discretion in that (a) Estes' legal counsel merely acted, in good faith, in accordance with the Missouri Rules Of Civil Procedure, (b) at all time from September 24, 2001 to the current date Garner was in default for failure to appear, (c) Estes and her legal counsel were not required under Rule 43.01[a] to serve the July 15, 2002 motion to set aside the January 18, 2002 dismissal of Garner for failure to prosecute or give Garner notice of hearing thereon since Garner was then in default for failure to appear and no new Petition claims were being asserted against Garner, (d) Estes and her legal counsel were not required under Rule 43.01[a] to serve the July 16, 2002 motion for default judgment against Garner or give Garner notice of hearing thereon August 2, 2002 since Garner was then in default for failure to appear and no new Petition claims were being asserted against Garner and (e) the July 15, 2002 set aside of the January 18, 2002 dismissal of Garner for failure to prosecute was proper since the St. Charles County Sheriff's August 23, 2002 return of personal service upon Garner was lost or misplaced by the Clerk of The Circuit Court of The City of St. Louis through no fault of Estes or her legal counsel.

(A) Standard For Appellate Review :

Appellate review of a trial court order imposing a Rule 55.03 sanction is reviewed on an abuse of discretion standard. Long v. Cross Reporting Service, __ S.W.3d __ (Mo. App. W.D. 2003), Appeal No. WD61272, Op. February 25, 2003.

(B) Trial Court Abused Its Rule 55.03 Discretion :

The trial court imposed a \$1,000 monetary sanction against Estes' attorney solely on the ground "It is apparent to the Court that Mr. Muegler's untimely ex parte vacation of a dismissal for failure to prosecute, without notice to the affected party (Sic: Garner), and subsequent pursuit of a default judgment against the reinstated party is an attempt to

improperly employ the Court to obtain a judgment that is not supported in law. In light of Mr. Muegler's procedural conduct in the prosecution of this action, the Court finds that sanctions in the sum of \$1,000.00, representing the reasonable attorney's fee and expense incurred by opposing counsel, is appropriate". LF:79.

The trial court clearly abused its discretion because all Muegler did was, in good faith, follow the procedure prescribed by Rule 43.01(a) [i.e. "... no service need be made on parties in default for failure to appear ..."] and the holding in Citizens National Bank v. Boatmen's National Bank, 934 S.W.2d 6 (Mo. App. E.D. 1996).

Garner was not entitled to notice or service of pleading after September 24, 2001 because it was in default for failure to appear.

Estes' legal counsel cannot be properly sanctioned under Rule 55.03(b) or condemned for following a course of action authorized by the Missouri Rules Of Civil Procedure and Missouri case law.

The trial court clearly abused its lawful discretion by imposing sanctions upon Estes' legal counsel.

(C) Point II Conclusion :

The November 1, 2002 order imposing a \$1,000.00 Rule 55.03(b) monetary sanction upon Estes' legal counsel should be reversed as a matter of law.

VI.
Conclusions

Based upon the facts, points, authorities and argument contained in this Brief of Appellants Point I, the November 1, 2002 Order (LF:71) should be reserved and the cause

should be remanded to the trial court with instructions to reinstate the August 2, 2002 (LF:52) Final Judgment.

Based upon the facts, points, authorities and argument contained in this Brief of Appellants Point II, the November 1, 2002 Order (LF:71) imposing a \$1,000.00 Rule 55.03(b) monetary sanction upon Estes' legal counsel should be reversed as a matter of law.

Respectfully submitted March 20, 2003.

—
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Rule 84.06(c) Certification

Pursuant to Rule 84.06(c) the undersigned hereby certifies this Brief of Appellant (a) contains the information required by Rule 55.03, (b) complies with the limitations contained in Rule 84.06[b] and (c) contains 9,759 words and 1,089 lines determined by The Microsoft Office 2000 Word computer program count (program used to prepare this Brief of Appellant).

Arthur G. Muegler, Jr. MoBar #17940
Attorney for Appellant Jamie N. Estes

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

JAMIE N. ESTES,)	
)	
Plaintiff/Appellant)	
)	
vs.)	
)	Appeal No. ED82102
NORWEST MORTGAGE, INC. et al,)	
)	
Defendants/Respondents)	
_____)	

Certificate of Service

The undersigned certifies two (2) true copies of Brief of Appellant herein [together with one (1) 3 ½" computer diskette, scanned for virus, containing the same] and this Certificate of Service were served March 20, 2003 by First Class U.S. Mail, postage prepaid, addressed to Respondent's legal counsel Mitchell D. Jacobs, Esq., 8012 Bonhomme, Suite 300, St. Louis, Missouri 63305. .

—

Arthur G. Muegler, Jr. MBE #17940
Attorney for Appellant Jamie N. Estes

ADDENDUM